

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

COLUMBUS-McKINNON, INC.,
Petitioner

v.

GEARENCH, INC.,
Respondent

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

DAVIDSON, MEAUX, SONNIER
& McELLIGOTT
JEFFREY A. RHOADES
810 S. Buchanan Street
Lafayette, Louisiana 70502

Attorneys for Respondent
Gearench, Inc.



i

QUESTION PRESENTED FOR REVIEW

Whether a remand for the purpose of amendment of defective allegations of jurisdiction, pursuant to 28 U.S.C. Sec. 1653, can encompass an authorization that the District Court record be supplemented as to jurisdictional facts.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record, certifies that the following persons and parties have an interest in the outcome of this case:

1. Petitioner, Columbus-McKinnon, Inc.
2. Respondent, Gearnch, Inc.
3. Travelers Insurance Company
4. Mission Insurance Company
5. Kenneth G. Engerrand, G. Byron Sims, and Brown, Sims, Wise & White, counsel for Petitioner, Columbus-McKinnon, Inc.
6. Jeffrey A. Rhoades and Davidson, Meaux, Sonnier & McElligott, counsel for Respondent, Gearnch, Inc.

Additional Parties below were:

7. Plaintiffs, Bess Caroline Molett, John Dreisch Molett, IV, Pamela H. Landry, Nicholas Ross Landry and Mark James Landry
8. Defendants, Penrod Drilling Company, Marathon LeTourneau, Inc., Armco Steel Company, Superior Derrick Services, Inc., Kulkoni, Inc., and Aetna Life & Casualty Company and/or Aetna Casualty & Surety Company
9. Intervenors and Third-Party Defendants, McBroom Rig Building Services, Inc., The North River Insurance Company and International Surplus Lines Insurance Company

10. Third-Party Defendants, Taisho Marine & Fire Insurance Company, Naniwa Tekko K.K., and K-M International

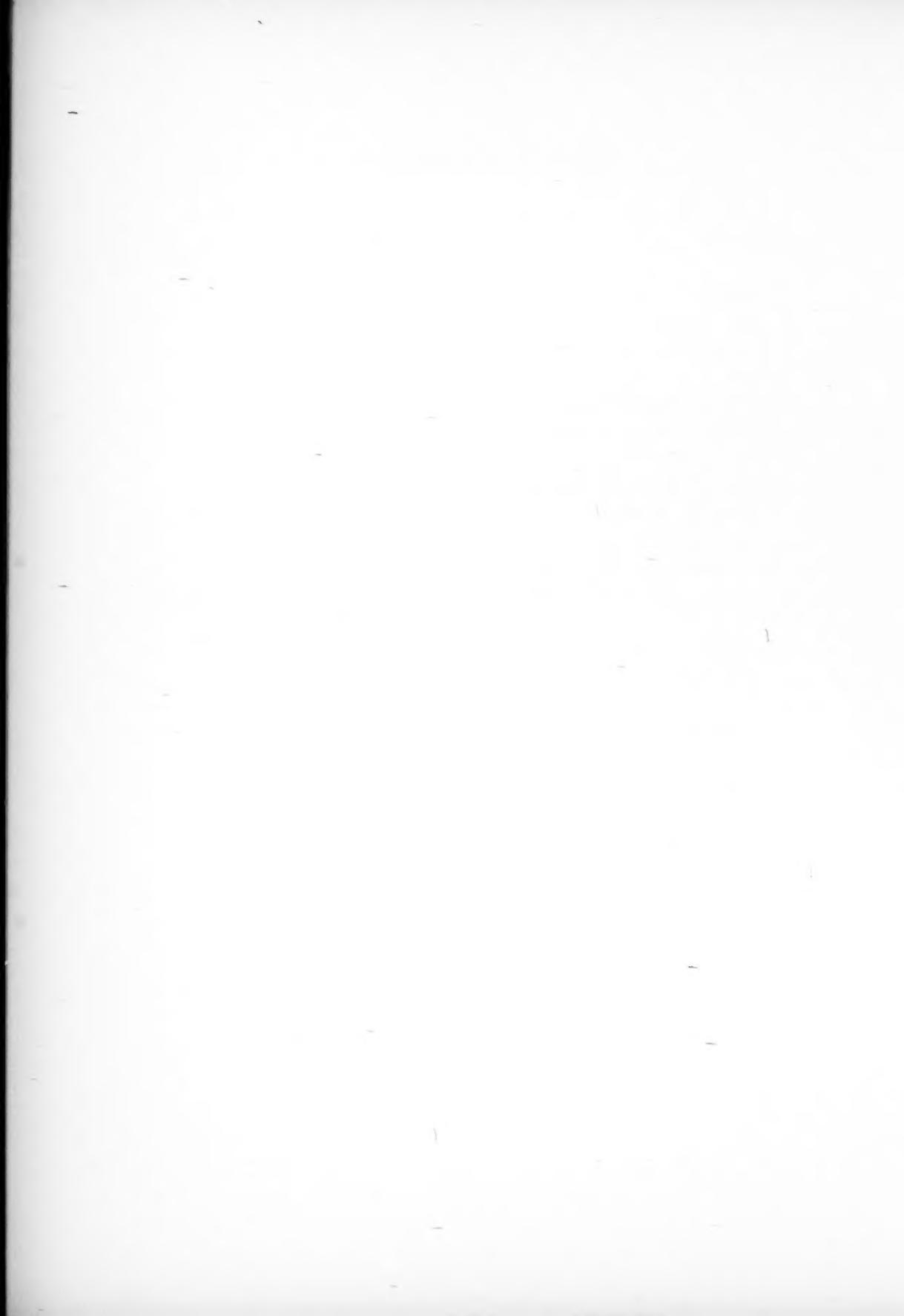
Jeffrey A. Rhoades
JEFFREY A. RHOADES
Attorney for
Gearench, Inc.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Certificate of Interested Persons	ii
Table of Contents	iv
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Argument	4
Certificate of Service	10

TABLE OF AUTHORITIES

	Pages
CASES	
<i>District of Columbia, ex rel American Combustion, Inc. v. Transamerica, Inc.</i> , 797 F.2d 1041 (D.C. Cir. 1981)	5
<i>Molett v. Penrod Drilling Company, et al</i> , 872 F.2d 1221 (5th Cir. 1989)	3, 4, 6
<i>Neely v. Banker's Trust Company</i> , 757 F.2d 621 (5th Cir. 1985)	4
<i>Newman-Green, Inc. v. Alfonzo Larrain</i> , ____ U.S. ____ , 109 S.Ct. 2218, L.Ed.2d 893 (1989) . . .	6, 7, 8, 9
<i>Sarnoff v. American Home Products Corporation</i> , 798 F.2d 1075 (2d Cir. 1986)	5
<i>Stockman v. LaCroix</i> , 790 F.2d 584 (2d Cir. 1986)	5
<i>Towns v. Country Quality Meats, Inc.</i> , 610 F.2d 313 (5th Cir. 1980)	4
STATUTES	
28 U.S.C. 1332(a)(2) (a)(3)	7
28 U.S.C. Sec. 1653	i, 3, 4, 6, 7, 8, 9



NO. 89-642

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COLUMBUS-McKINNON, INC.,
Petitioner

v.

GEARENCH, INC.,
Respondent

**BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

OPINIONS BELOW

Respondent, Gearench, Inc., (Gearench), adopts herewith the statement of opinions below presented in the original Petition for Writ of Certiorari and joins, by way of reference thereto, in the appendices attached to the original Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional statement of petitioner, Columbus-McKinnon, Inc., (Columbus-McKinnon), is adopted herein by way of reference thereto.

STATUTES INVOLVED

The presentation of statutes involved in this matter made by Columbus-McKinnon is in its Petition for Writ of Certiorari and is adopted by way of reference thereto.

STATEMENT OF THE CASE

John Molett, III and Harold E. Landry were killed on January 27, 1983, while engaging in the construction of a derrick on a jack-up barge owned by Penrod Drilling Company.

Various survivors brought wrongful death actions against Penrod and other companies who were either directly or tangentially involved in the accident which resulted in the death of Molett and Landry. Several third party demands were thereafter filed among named defendants seeking indemnity and/or contribution among the defendants.

Following a jury trial on the merits, and prior to the return of the jury verdict, one defendant, Gearench, settled with the plaintiffs while preserving its claim against other defendants, Columbus-McKinnon and Penrod Drilling Company (Penrod) for indemnity and/or contribution. The jury was, therefore, dismissed.

Several weeks after the jury was dismissed, the trial court considered Gearench's claim for indemnity and found Columbus-McKinnon liable to Gearench for the same. The claim for indemnity against Penrod was dismissed.

Columbus-McKinnon appealed the finding of liability for indemnity, nonetheless, the Fifth Circuit found both Gearench and Columbus-McKinnon liable for the plaintiff's injuries, thereby rendering Columbus-McKinnon liable to Gearench for indemnity. The matter was thereafter remanded to the trial court for a finding of whether or not the settlement was reasonable. The trial court determined that the settlement was reasonable.

Columbus-McKinnon retained new counsel who appealed the trial court's ruling a second time, and who raised the issue of subject matter jurisdiction for the first time during the second appeal.

During the extended period of litigation described above, a pre-trial brief, a post-trial brief, an appellate brief and a brief on remand failed entirely to challenge the existence of subject matter jurisdiction. The question of subject matter jurisdiction was also not raised at oral argument on the first appeal to the Fifth Circuit. Only on the second appeal was the matter of the basis of subject matter jurisdiction over Gearench's claim first challenged.

In considering the challenge to jurisdiction the Fifth Circuit found that there was no admiralty jurisdiction in the premises, but remanded once again for the purpose of allowing Gearench to amend defective allegations of diversity jurisdiction and for the record to be supplemented. See, *Molett v. Penrod Drilling Company, et al*, 872 F.2d 1221 (5th Cir. 1989); Appendix to Writ Application p. B-16.

The question as to whether such a remand is proper under 28 U.S.C. 1653 is the sole issue presented by the writ application presently pending before this Court.

ARGUMENT

As this Court is abundantly aware, 28 U.S.C. Section 1653 provides:

“Defective allegations of jurisdiction may be amended upon terms, in the trial or appellate courts”.

Following this clear mandate, the Fifth Circuit in *Molett*, 872 F.2d 1221, 1228, stated the following:

“Where, as here, jurisdiction is not clear from the record, but there is some reason to believe that jurisdiction exists, the Court may remand the cause to the District Court for amendment of the allegations and for the record to be supplemented.”

Counsel for Columbus-McKinnon argues that the mandate of the panel below is a novel one; nonetheless, a stay of that mandate pending presentation of this issue to the United States Supreme Court was denied, apparently signifying the Fifth Circuit’s clear disagreement with such an argument.

The jurisprudence which supports the action of the Fifth Circuit panel on the issue before this Court is clear.

In *Towns v. Country Quality Meats, Inc.*, 610 F.2d 313 (5th Cir. 1980), plaintiffs, who brought causes of action for damages in tort and in contact arising out of the purchase and consumption of poisoned meat, were allowed to allege by way of amendment, principal place of businesses of corporate defendants and thereby cure defective allegations of diversity jurisdiction. See, also, *Neely v. Banker’s Trust Company*, 757 F.2d 621 (5th Cir. 1985).

No argument can be made that granting a right to amend pleadings to cure defective jurisdictional allegations is not freely and liberally extended.

Furthermore, record supplementation in support of amended allegations is also a matter well founded in the jurisprudence.

In *District of Columbia, ex rel American Combustion, Inc. v. Transamerica, Inc.*, 797 F.2d 1041 (D.C. Cir. 1981), the Court indicated that if an amendment of jurisdictional allegations at the appellate level is challenged by opposing counsel, then remand for supplementing of the record would occur. See, also, *Stockman v. LaCroix*, 790 F.2d 584 (2d Cir. 1986), and *Sarnoff v. American Home Products Corporation*, 798 F.2d 1075 (2d Cir. 1986). The above circuit's decisions have been clearly adopted by the Fifth Circuit, as well, as is evidenced by its mandate in this case.

In prior proceedings, counsel for Columbus-McKinnon argued that Gearench should be denied the right to offer such supplemental proof because Gearench had continual knowledge that its allegations of jurisdiction were challenged. To this argument, the comments of the panel below are appropriate.

"Gearench had no notice, nor should it be charged with any notice, of a defect in jurisdiction prior to this second appeal. In the original action, plaintiff's alleged not only diversity jurisdiction, but also admiralty jurisdiction based upon Section 905(b) and general maritime negligence claims. The diversity of the parties was never materially at issue. Columbus-McKinnon concedes that as a part of the pre-trial order, "the parties stipulated that the jurisdiction and venue

of the case were based on: General maritime law, pendent state claims asserted by plaintiffs versus various defendants." Our previous discussion of the confusion in our own admiralty precedents is enough to demonstrate that it was not unreasonable for Gearench to have assumed that admiralty jurisdiction existed at least over plaintiff's claims against Penrod."

Furthermore, Gearench was a defendant to the original action. As such, it had no burden to prove diversity between the original parties or between it and its third party defendants assuming ancillary jurisdiction existed. Our decision in *Molett I* dealt only with the lack of admiralty jurisdiction over Gearench's cross claim, and the issue was really what law would apply to that claim. As we have stated earlier, that is not dispositive of admiralty jurisdiction over plaintiff's claims against Penrod. Our decision that focused on what law to apply to the indemnity claim should not necessarily have alerted Gearench that the jurisdiction of the Court itself was at issue. Indeed, on remand, Columbus-McKinnon did not challenge the jurisdiction of the district court. Only now is there argument that admiralty jurisdiction might not exist and that the allegations of diversity are defective." *Molett*, 872 F.2d 1221, 1228.

As a final challenge to the action taken by the panel in this case, counsel for Columbus-McKinnon cites this Court to the *Newman-Green, Inc. v. Alfonzo Larrain*, ____ U.S. ____ . 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989), a decision wherein this Court construed the ambit of 28 U.S.C. Sec. 1653.

Counsel for Columbus-McKinnon attaches a meaning to the decision which is far beyond the scope intended or contemplated by the decision. Counsel for Columbus-McKin-non equates the concept of defective jurisdictional facts to the concept of an incomplete record on the jurisdictional issue.

In *Newman-Green*, this Court considered the applicability of 28 U.S.C. Sec. 1653 to a situation wherein the complainant, Newman-Green, Inc., brought a state law contract action against a Venezuelan corporation, four Venezuelan citizens, and an American citizen domiciled in Venezuela. Because the American citizen was a citizen of the United States, but not domiciled in any state, the Court of Appeals held that there was no complete diversity under either 28 U.S.C. 1332(a)(2) or (a)(3). On rehearing, *en banc*, the Seventh Circuit remanded the cause to the trial court to determine whether it would allow dismissal of the non-diverse party. Thereafter, a petition for writ of certiorari was granted *for the sole purpose of determining whether appellate courts could dismiss "jurisdictional spoilers" and preserve diversity*. *Newman-Green*, 109 S.Ct. at 2222. [emphasis added].

In discussing the issue of the scope of 28 U.S.C. Sec. 1653, the Court indicated as follows:

"Title 28 U.S.C. Section 1653, enacted as part of the revision of the Judicial Code in 1948, provides that, 'defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts'. At first blush, the language of this provision appears to cover the situation here, where the complaint is amended to drop a non-diverse party in order to preserve statutory jurisdiction. But Section 1653 speaks of the amendment

of 'allegations of jurisdiction' which suggests that it addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves. Under this reading of the statute, which we believe is correct, Section 1653 would apply if Bettison were, in fact, domiciled in a state other than Illinois, or was, in fact, not a United States citizen, but the complaint did not so allege. It does not apply to the instant situation, where diversity jurisdiction does not, in fact, exist.

'This interpretation of Section 1653 is consistent with the language of its predecessor statute, enacted in 1915, which expressly limited jurisdictional amendments to cases in which diversity jurisdiction "in fact existed at the time the suit was brought or removed, though defectively alleged'." *Newman-Green*, 109 S.Ct. at 2222.

In spite of discussions regarding the scope of Section 1653, this Court was required to resolve the sole issue of whether or not an appellate court had the authority to dismiss a dispensable non-diverse party. The Supreme Court held that it did. Ironically, citing deference to longstanding jurisprudence, this Court held that which seemingly would allow amendment to jurisdictional facts. Gearench does not seek such broad relief.

No interpretation or stretch of the imagination can construe the holding of *Newman-Green*, in the context of its facts, to prohibit the appellate court from remanding pursuant to 28 U.S.C. Section 1653 for amendment and record supplementation, provided that the same merely bears out jurisdictional facts which always existed.

Concluding, in order to find support for his position in *Newman-Green*, counsel for Columbus-McKinnon must equate defective jurisdictional facts with an incomplete record; it is urged by Gearench that to do so gives, indeed, a novel interpretation to 28 U.S.C. Sec. 1653 and its attendant jurisprudence. Counsel for Gearench intends, by way of amendment and record supplementation to do no more than present to the Court jurisdictional facts which have existed since the inception of this litigation. No court is being asked to create or accept jurisdiction by curing defects in jurisdictional facts.

In as much as the mandate of the Fifth Circuit in this matter was not stayed, counsel for Gearench has prepared amended pleadings and gathered the necessary evidence to conclusively show that complete diversity does and has always existed herein. For the foregoing reasons, therefore, the matter pending before this Court is in complete conformity with 28 U.S.C. Sec. 1653 and its longstanding historical interpretation by the Courts. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Jeffrey A. Rhoades
JEFFREY A. RHOADES
810 S. Buchanan Street
P. O. Drawer 2908
Lafayette, Louisiana 70502

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has this day been forwarded to all counsel of record by placing same in the United States mail.

Lafayette, Louisiana this 15th day of November, 1989.

Jeffrey A. Rhoades *per ce*
JEFFREY A. RHOADES

